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Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

FILED

AUG 7 - 1959

Clark, Supreme Court, Utah

LEROI R. CLARK and DAGMAR J. CLARK,
his wife, CLYDE R. THOMPSON and MRS.
CLYDE R. THOMPSON, his wife,

Plaintiffs and Appellants,

-vs-

JAMES T. EREKSON, and KATE M. EREKSON,
his wife, MARLOWE L. CRABTREE and
ELIZABETH A. CRABTREE, his wife, and
MARY FERN EREKSON,

Defendants and Respondents,

Case
No. 9005

UNIVERSITY UTAH

AUG 6 1959

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APPELLANTS' BRIEF

JOSEPH S. KNOWLTON
Attorney for Appellants

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IN THE SUPREME COURT
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LEROY R. CLARK and DAGMAR J. CLARK,
his wife, CLYDE R. THOMPSON and MRS.
CLYDE R. THOMPSON, his wife,

Plaintiffs and Appellants,

-Vs-

No. 9005

JAMES T. EREKSON, and KATE M. EREKSON,
his wife, MARLOWE L. CRABTREE and
ELIZABETH A. CRABTREE, his wife, and
MARY FERN EREKSON,

Defendents and Respondents.

APPELLANTS' BRIEF

STATEMENT OF FACTS

Plaintiffs Clarks purchased a piece of property from a Schryver in 1935, Exhibit P-7. Plaintiffs sold the property to plaintiffs Thompsons and a survey was made, Exhibit No. 6. This survey indicated that defendents Crabtrees property line ran into the west end of plaintiffs property by approximately twenty-

five feet. There is evidence that there were two monuments at the west corner of Section 17.

This action was brought to quiet title to the piece of property in question approximately 25 feet inside of a line of trees that plaintiffs had used as their west boundary of the property for an admitted 20 years or more. (Pre-Trial Order, Paragraph 11.)

Exhibits P-1, P-2, P-3, P-4, P-5, 8, and 9, are photographs of the line of trees, fence line and garage plaintiffs claim as their west boundary.

There is a lane, commonly known as Erakson's Lane, that runs along the west boundary of plaintiffs property; its dimensions can be seen from Exhibit 6 as it passes plaintiffs property, and its general character can be seen from the exhibits, the photographs, as mentioned aforesaid. Erakson's Lane runs approximately 25 feet in width between plaintiffs tree line and defendants Crabtree's east boundary,

which is a fence. It is defendants contention that Brekson's Lane is a 50-foot wide county road, from Crabtrees' east boundary line, and that plaintiffs (predecessor in title) planted the trees and placed the garage 25 feet into the middle of the county road.

The evidence was adduced at the trial by the plaintiffs and defendants and some of the older residents in the area. The uncontested evidence indicated that the lane had been used more or less continually by local residents as a short cut from Vine Street to 59th South St.; that its use has been as far back as 1890, always with the apparent permission of the property owners. It was used for horse and buggy travel, foot travel, and automobile travel in these later years.

The testimony as to the width of the lane, at various places and at various times was conflicting and generally vague. The testimony indicated the lane to be from 50 feet in places to 16 to 20 feet in other places. It was in general agreement that

the pond, as indicated in Exhibit 5, extended at one time out to where the line of trees are at the present time; that the pond was filled in and two to four years later the row of trees was planted along the whole of plaintiffs property line, as is the present situation. The evidence generally showed that this filling of the pond and planting of the trees took place more than 35 years ago. The evidence also showed that the lane traveled past plaintiffs land, through Little Cottonwood Creek, and meandered through defendant Erikson's pasture land; and that there were gates placed across the lane to keep defendants' Eriksons cows in the pasture land in the fall. These gates were across the lane during the periods when the cows were in, but never locked, and no one was stopped from using the lane because of these gates.

The evidence showed also that Little Cottonwood Creek was dredged in approximately 1949, which made it difficult for automobiles to pass through the lane. The present use of the lane, as testified to by defendant

Crabtree, is approximately 100 cars a month, or about three cars a day. There was also testimony that the lane had been moved by defendant Erekson at his apparent pleasure to conform to the use he made of the land through which the lane passed.

STATEMENT OF POINTS RELIED ON FOR REVERSAL.

1. A public road has not been established by the facts of this case.

2. If a public road has been established it has not been established as a public road 40 to 50 feet wide along the side of and through plaintiffs property.

3. Forty to fifty feet is not a width that is reasonable and necessary under all the facts and circumstances for the uses which were made of the lane.

4. The trial court cannot require plaintiffs to remove trees, shrubs, buildings, etc. from a public road that is widened by court decree as necessary for the reasonable use of said road.

ARGUMENT

Point 1.

The defendants admitted the privileged use of the strip of ground in question for more than 20 years and as such the defendants carried the burden of proving a public highway. There was no evidence introduced that the Erikson Lane was formally dedicated as a public highway by any past owners of the land through which Erikson's lane passes. Defendants rely upon the descriptions of various deeds to the lands abutting the said lane, which generally state:

"Commencing in the center of an open street".....
and in the case of defendants Eriksons deed as found in the Erikson Abstract, entry No. 3:

"To the center of a north and south county road; thence south 18.4 chains to beginning."

It is claimed by the defendants that the street was laid out and used prior to the issuance of patent and hence became a public street under 43-USCA-932 that provides:

"The right of way in the construction of public highways over public lands not reserved for public uses is hereby granted."

That defendants further contend that since the issuance of patent the lane has openly and notoriously been used by the public for more than ten years, and became a street, pursuant to Section 27-1-2 and 3 Utah Code Annotated, 1953, and predecessor statute, Chapter 29, Utah Laws, 1880; and Chapter 12, Laws of Utah, 1886. Such statute provides:

27-1-2:

"Public use constituting dedication.....
a highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

27-1-3:

"Highways once established continue until abandoned.....All highways once established must continue to be highways until abandoned by order of the Board of County Commissioners of the county in which they are situated, or other competent authority."

The defendants further claim that the width of the road is what is reasonable and necessary under all the facts and circumstances for the uses made of the road and such width under such reasonable and necessary

circumstances is not less than 50 feet.

The evidence presented in this case that the lane in question was a public road consisted of the abstracts of titles to the properties held by plaintiff Exhibit 7, and the Abstracts of Titles to the properties held by the defendants. These abstracts have in descriptions to the properties reference to a north-south county road and north-south open street, etc.

There was also a district court decision introduced, case No. 40279, J. T. Erikson vs James McClannahan. Said suit commenced May, 1927, which had as one of its findings of fact that more than 50 years ago the said right of way, hereinbefore described was dedicated and set apart as a roadway by the owners of the property at that time, abutting on the side of said right of way. The property owned by McClannahan at that particular time is located on Erikson's Lane, approximately one city block east of the Clark and Crabtree properties. The other evidence as to the establishment of a county street was testimony as to the continued use of

Erekson's Lane by the public for more than ten years. The evidence showed that the use of the land was never objected to by the owners of the lands and that the owners permitted their neighbors to travel through the land as an accomodation.

"Adverse use is requisite to the acquisition of an easement by prescription."
(17-Am. Jur. 701.)

The evidence also showed that defendents had constructed and maintained gates across said Erekson's Lane for many, many years. If adverse use is not requisite to the development of an easement by prescription, then the gates as constructed and maintained by the defendents were to bar public use and preserve the private character of the lane. The evidence showed that Erekson's gates allowed him to use the section of the land enclosed therein as his private pasturage for a part of each year.

The descriptions of the properties in the abstracts referring to a north-south county road, and the findings of fact relating to property one block north of the property herein disputed in an old district court

case in no way shows a dedication to the public, either formally or by prescription. Therefore, the only evidence presented by defendants to prove a dedication of a public highway was based upon public use for more than ten years.

If said lane consists of only a private easement then all or any portion thereof may be abandoned. (17-Am. Jur. 781.)

There is no question but what if this is a private easement, then the property in dispute has been abandoned. It is not felt that an adverse public use for ten years has been shown as the uncontroverted facts show that said use has been permissive at all times.

Points 2. and 3.

Points two and three have been combined for convenience.

If public use has established a public road along Erikson's Lane, the reasonable and necessary use that the road has been put to determines the width thereof. The evidence showed the width of said lane varied from 16 to 20 feet to 50 feet throughout its

length.

Defendants witness, Gilham, indicated that the lane was all of 50 feet north of the creek, and that there was no fence on the west side of the lane. (Line 2, Page 136 of the transcript.)

Mr. Gilham also indicated that there was no trouble passing through ponds or other barriers along the side of the lane. (Line 17, Page 136; and on line 17, Page 137 of the transcript:) Mr. Gilham indicated that 'when you take that far back, you don't remember everything there.'

Mr. Gauvin indicated that the road was rather irregular where it passed by plaintiffs property and that the pond came out almost to where the trees were planted, and that the trees were planted about 1925 or 1930. (Line 28, Page 143 and Line 28, Page 146 of the transcript.) Mr. Gauvin also indicated that vehicles could pass the point where the lane passed by the plaintiffs property adequately. (Line 25, Page 156 of the transcript.)

Mr. Godfrey indicated that the lane was from 16 to 20 feet wide as you pass through the creek. (Line 24, Page 166 of the transcript.)

Mr. Thorum indicated that the people crossed the creek 'wherever you could get across it.'
(Line 12, Page 198 of the transcript.)

Mr. Gaufin indicated that the lane was wider on both sides of the pond when it extended out into the area where the trees are planted now, and that the lane at that point where the pond extended was approximately 25 feet wide, as it is today. At no time has this lane been any wider than said 25 feet, at this point, with the exception of, at the most, four to five years, between the time that the pond was filled in and the time the trees were planted.
(Line 28, Page 145, of the transcript.)

The latest case that dealt with this particular problem was the case of Boyer vs Clark, 326 Pac. 2nd 107, which involved a canyon road in Summit County which had been used in the past 50 years for hauling coal, driving sheep, courting, and hunting. At various intervals the owners of the fee closed the road off. The Supreme Court held that the use of the road constituted a dedication to the public and that as no formal action had been taken by the county, the

road still existed.

The case was sent back to the lower court for a determination of the proper width, such width being what is reasonable and necessary for the uses the road had been put to.

Another Summit County case: Jeremy vs Bertagnole, 116 Pac. 2nd 420, involved similar problems, and is very similar to the case here in question. The public use of the road was that sheep and cattle in large herds were driven through the road for many years, and that the trial court found a width of 60 feet to five rods to be proper. The Supreme Court confirmed this, but said in part:

"Hence while it is true as contended by appellant that where dedication is established by user the use to which the way has been put measures the extent of the right to use. This limitation goes to the kind of use. A particular use having been established, such width should be decreed by the court as will make such use convenient and safe. A bridal path abandoned to the public may not be expanded by court decree into a boulevard. On the other hand, the implied dedication of a roadway to automobile traffic is the dedication of a roadway of sufficient width for safe and convenient use thereof by such traffic."

In the present case it was testified to by de-

fendent Crabtree that the present use of the lane was approximately 100 cars a month, or three cars a day. It is noticeably in the evidence that the volume and use of said lane substantially diminished since the advance of the automobile.

The defendants appear to want the court to widen and convert this small, meandering lane, which has been adequate for all purposes to which the lane has been put, for as long as the present residents of the area can recall, into a broad boulevard.

Most all of the witnesses indicated that the character and use of the said lane had not changed through the years.

Mr. Gaufin (Page 153, Line 27 to 30), Mr. Godfrey (Page 165, Lines 11 to 13), Mrs. Ottley (Line 11 thru 21, Page 170), Mr. Erakson (Line 13 to 15, Page 186), Mr. Thorum (Line 5, Page 199), Mr. Howe (Line 10, Page 200), and Mr. Dunster (Line 10, Page 204 of the transcript).

Defendants contend that at present the county requires 50 feet before they will accept a dedication. Hence, the reasonable and necessary width of this lane should be 50 feet.

In this case, it appears that the trial court went beyond the uses to which the road had been put in the past in determining what the reasonable and necessary width of the lane needs to be.

If we are going to grant to the district courts the power of eminent domain, the power to condemn private property for the use of the public, then the right to so condemn private property should be subject to a narrow construction and should be scrutinized with utmost care to see that the courts do not go beyond what is reasonable and necessary for the uses which have been made of the road.

Point 4.

If the court is to be allowed to condemn private property on either side of a lane, can they require the property owner to remove long-standing improvements at their own expense? Or if said lane is to be decreed a public road and the width thereof extended 40 and 50 feet under the guise of that which is necessary and reasonable for the uses which

were made of it, are they going to require the parties to bear the expenses of removing said improvements? Or is said expense that which should be borne by the public, as the public is the benefactor of said widening?

The case of *Jeremy vs Bertagnole* (supra) states:

"The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel and where the public have acquired the easement, the land subjected to it has passed under jurisdiction of the public authorities for the purpose of keeping the same in proper condition for the enjoyment thereof by the public. Such authorities are bound to keep the road open and in suitable repair; and if obstructions be placed thereon it is their duty to remove the same and care for rights of the public."

CONCLUSION.

It is of particular importance to note that at no time was this lane any wider than 25 feet where the present pond is now located, with the exception of from two to four years, between the time the pond was filled in and the trees planted. Two to four years is not ten years and is not long enough

to establish a public road by prescription. So, at that particular point, at least, the court has extended the lane into plaintiffs property 25 feet.

There has been no evidence introduced by defendants that this lane was inadequate or unsatisfactory for its present and past uses. No evidence that the lane needs to be wider for the safety and convenience of the public; and no evidence that the lane needed to be wider for adequate maintenance of the road.

In fact, all of the evidence indicated that the lane has not changed in its character or use for as long as anyone can remember.

It is beyond reason to believe that 40 to 50 feet of roadway is reasonably necessary for the use of approximately 100 cars a month, or approximately three cars a day, and especially when the present lane has apparently been adequate for the uses to which the lane has been put for as long as we have evidence that the lane has existed.

Defendants claim that a 50-foot highway has

been dedicated by use through this particular area for more than ten years and the uncontradicted evidence was that the lane was only 25 feet in width at all times, with the exception of four to five years in the vicinity of the pond.

The apparent claim, then, is that 50 feet at this point is necessary for reasonable use, which is totally in contradiction to the evidence.

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